In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 541

FLORIDA EAST COAST RAILWAY COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment (242 F. Supp. 490) of a three-judge district court dismissing an action brought to set aside an order of

the Interstate Commerce Commission. The order granted the Atlantic Coast Line Railroad Company (Coast Line) a certificate of public convenience and necessity to construct a rail extension in Palm Beach County, Florida, and denied an application of the Florida East Coast Railway Company (East Coast) to construct a rail extension in the same county.

A. Duda & Sons and A. Duda & Sons Cooperative Association (collectively, Duda) and Gressinger & Sons (Gressinger), both vegetable producers, have until now shipped their produce on East Coast from a terminal in Belle Glade. As a result of the development of a new vegetable producing area in Palm Beach County, and the unsatisfactory condition of the facilities and service at Belle Glade, these shippers determined to move their shipping facilities into the new territory (J.S. 6b). After unsuccessful negotiations with East Coast (J.S. 7b), Duda approached Coast Line, which applied to the Commission (under Section 1(18) of the Interstate Commerce Act) for a certificate of public convenience and necessity to extend its existing lines into the new territory. The extension was projected to have a northern and a southern branch. The northern branch would terminate at the site of a proposed new vegetable packinghouse and pre-cooling plant of Duda; Gressinger proposed either to use the new Duda facilities or to construct its own packinghouse on the Duda property at this point (J.S. 26b). The southern branch would terminate at the site of the existing sugar mill of the South Florida Sugar Company (Serralles). East

Coast opposed Coast Line's application and applied for its own certificate to construct a rail extension for the same shippers. Duda and Gressinger supported Coast Line's application.

After hearings, the Commission found that (1) because of the recent growth of vegetable production in the area, the public convenience and necessity required an extension of a rail line into it (J.S. 7b) but (2) justified issuance of a certificate to only one of the two applicants (J.S. 8b-9b); (3) East Coast was currently unable to carry out its proposal and build an extension within a reasonable period of time (J.S. 9b); (4) Coast Line was financially and otherwise prepared to carry out its proposal (J.S. 12b, 33b); and (5) certifying Coast Line to serve the new area would not disturb the competitive positions of the parties since, among other things (*a*) East Coast would have lost the traffic shifting to the new area regardless of the certification of Coast Line (J.S. 6b, 7b), and (*b*) East Coast would gain some traffic in sugar to compensate for the vegetable traffic it would lose in the relocation of Duda and Gressinger (J.S. 12b, 13b). The Commission certified Coast Line.

East Coast petitioned the three-judge district court below to set aside the Commission's order. On the day set for oral argument, East Coast reported to the court that the mill of South Florida Sugar, which was to be served by the southern branch of the proposed Coast Line extension, was to be dismantled and that there would now be no use for the southern branch. East Coast thereupon (1) moved the court to remand the proceedings to the Commission to con-

sider the effects of this change in circumstances upon its original order, and (2) petitioned the Commission to reopen the case. The Commission denied the petition, finding that even without South Florida as a shipper, "the public convenience and necessity require a rail extension since Coast Line's proposed extension will reach two shippers which require rail service," and "that the area in question is being developed and rail service is necessary for future requirements as well as to meet the immediate present needs of the two shippers involved" (J.S. 2c). It further held that the elimination of the third shipper would not alter its prior decision that East Coast was unqualified to construct its proposed extension within a reasonable time (J.S. 2c). The three-judge court affirmed both the Commission's decision not to reopen the proceeding and its decision to certify Coast Line.

ARGUMENT

The sole question presented in the jurisdictional statement is, in point of fact, not raised by the facts of this case. The question is whether the Interstate Commerce Commission may authorize the construction at railroad expense of a "private line" (J.S. 9) for the benefit of a single shipper, Duda. It is clear, however, that the rail extension which the Commission has certified Coast Line to build is *not* a private line and will benefit other shippers besides Duda.[1]

---

[1] Even if it were designed to provide rail service to only one shipper, that would plainly *not* preclude grant of a certificate of public convenience and necessity. See, *e.g.*, *Chicago, Rock*

1. The court below found that, besides Duda, Gressinger would use the extension: "Gressinger & Sons, who will either use the Duda facility or erect one of its own, are substantial producers and will become substantial shippers on the A C L extension" (J.S. 3a). For, as the Commission found, "Duda approached Gressinger about a year and a half ago offering Gressinger the use of the new Duda facilities or Gressinger could construct its own packinghouse on the Duda property at this point. Gressinger and Duda have a close working relationship, their sales organizations cooperated and work together, and the two concerns frequently interchange produce" (J.S. 26b). It may be, as appellant suggests (J.S. 9), that Duda *could* block Gressinger from access to the Coast Line extension, but this is a remote and unlikely eventuality which does not confer a private character upon the extension.

2. More important, there are other potential users of the Coast Line extension besides Gressinger—users whom Coast Line, as a common carrier, could not refuse service to and whose access to the extension Duda could not conceivably block. At most, Duda could control access to the line only from one side of the northern branch. Serralles owns the property on the other side of the northern branch and on both sides of most of the remaining portion of the line; and there is no corporate relationship between Serralles and

---

Island & Pacific Railroad Co. v. *United States*, 205 F. Supp. 378 (N.D. Ill.).

Duda (J.S. 8b). The needs of potential shippers were an important factor in the Commission's decision to authorize the rail extension: "the area in question is being developed and rail service is necessary for future requirements as well as to meet the immediate present needs of the two shippers involved" (J.S. 2c). The Commission's emphasis on the future requirements of other shippers negates the contention that the Commission was authorizing a private line.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be affirmed.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

ROBERT B. HUMMEL,
Attorney.

ROBERT W. GINNANE,
General Counsel,

RAYMOND M. ZIMMET,
Attorney,
Interstate Commerce Commission.

OCTOBER 1965.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 789463 256